(1)

Supreme Court, U.S.
FILED
FEB 25 2005
OFFICE OF THE CLERK

No. 041169

In the

Supreme Court of the United States

SANDRA WHEATLEY AND JANE GROGAN
Petitioners,

v.

WICOMICO COUNTY, MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FRANCIS J. COLLINS
COUNSEL OF RECORD
KAHN, SMITH & COLLINS, P.A.
201 NORTH CHARLES STREET
BALTIMORE, MARYLAND 21201
(410) 244-1010

QUESTIONS PRESENTED

1. Whether, under the Equal Pay Act and Title VII, jobs that are classified in a "classified pay plan" within the same grade, and are admitted by the employer to be "comparable," can be the comparators used by the Petitioners to show a disparity in pay.

2. Whether the rule that an issue cannot be raised for the first time on appeal can be adapted for use at the trial level to bar a party from making an argument that is supported by the evidence.

PARTIES TO THE PROCEEDINGS

Petitioners are two women employees of Wicomico County, Maryland, Sandra Wheatley and Jane Grogan. They are the Director and Deputy Director of the Department of Emergency Services for the County.

Respondent is Wicomico County, Maryland.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

EVIDENCE THAT A FEMALE EMPLOYEE IS PAID LESS THAN MALE EMPLOYEES IN THE SAME GRADE CAN BE USED AS EVIDENCE OF DISCRIMINATION UNDER THE EQUAL PAY ACT AND TITLE VII. 6

PETITIONERS WERE UNDER NO OBLIGATION TO ARGUE THEIR CASE IN THE COMPLAINT OR IN OPENING STATEMENT SO AS TO APPRISE THE TRIAL JUDGE OF THEIR LEGAL ARGUMENTS. THE PROPER TIME TO ARGUE A CASE IS IN RESPONSE TO A MOTION FOR JUDGMENT OR IN SUMMATION. 15

CONCLUSION 18

OPINION OF THE FOURTH CIRCUIT 21

ORAL OPINION OF DISTRICT COURT JUDGE 38

ORDER DENYING PETITION FOR REHEARING 49

TABLE OF CITED AUTHORITIES

Federal Cases

Brennan v. City Stores, Inc.,
479 F.2d 235 (5th Cir. 1973) 32

Brennan v. Prince William Hosp. Corp.,
503 F.2d 282 (4th Cir. 1974) 10

Brewster v. Barnes,
788 F.2d 985 (4th Cir. 1986) 9, 10

Brinkley v. Harbour Recreation Club,
180 F.3d 580 (4th Cir. 1999) 10

Brinkley-Obu v. Hughes Training, Inc.,
36 F.3d 336 (4th Cir. 1994) 11

Buntin v. Breathitt County Bd. of Ed.,
134 F.3d 796 (6th Cir. 1998) 10

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 28, 33

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 11

Corti v. Storage Tech. Corp.,
304 F.3d 336 (4th Cir. 2002) 27

Desert Palace, Inc. v. Costa,
539 U.S.90 (2003) 5

E.E.O.C. v. Hernando Bank, Inc.,
724 F.2d 1188 (5th Cir. 1984) 10

EEOC v. Madison Community Unit School
Dist., 818 F.2d 577 (7th Cir. 1987) 32

Glenn v. General Motors Corporation,
841 F.2d 1567 (11th Cir. 1988) 10

Hodgson v. Fairmont Supply Co.,
454 F.2d 490 (4th Cir. 1972) ... 9, 28, 31, 33

Houck v. Virginia Polytechnic Inst.,
10 F.3d 204 (4th Cir. 1993) 33

Hutchinson v. Fidelity Inv. Ass'n,
106 F.2d 431 (4th Cir. 1939) 36

Kovachevich v. Kent State University,
224 F.3d 806 (6th Cir. 2000) 33

Love-Lane v. Martin,
355 F.3d 766 (4th Cir. 2004) 37

Pearce v. Wichata County,
590 F.2d 128 (5th Cir. 1979) 9, 10

Schultz v. Wheaton Glass Co.,
421 F.2d 259 (3d Cir. (1970) 28

Singer v. Dungan, 45 F.3d 823
(4th Cir. 1995) 27

Singleton v. Wulff, 428 U.S. 106 (1976) 18, 34

Soble v. University of Maryland,
778 F.2d 164 (4th Cir. 1985) 10, 13, 30

Strag v. Bd. of Trustees,
55 F.3d 943 (4th Cir. 1995) 30

Tele-Communications, Inc. v. Commissioner,
12 F.3d 1005 (10th Cir. 1993) 35

Texas Dep 't of Cmty. Affairs v. Burdine,
450 U.S. 248, 253 (1981) 37

United States v. Dinitz, 424 U.S. 600 (1976) 17

Waters v. Turner, Wood & Smith Ins. Agency,
Inc., 874 F.2d 797 (11th Cir. 1989) 32

Williams v. Prof Transp. Inc.,
294 F.3d 607 (4th Cir. 2002) 34

Statutes and Rules

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

29 U.S.C.§ 206(d)(1) (2000) 2, 9, 10, 24, 27

42 U.S.C § 2000e 2, 3

Fed. R. Civ. P. 50 17

Fed. R. Civ. P. 8(a) 17

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. A) is reported at *Wheatley, et al. v. Wicomico County, Maryland,* 390 F.3d 328 (4th Cir. 2004).

The district court opinion was rendered from the bench and was not reported. It is reproduced as Appendix B hereto.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on November 22, 2004. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on December 21, 2004 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Jurisdiction in the Fourth Circuit was proper pursuant to 28 U.S.C. § 1291.

Jurisdiction in the U.S. District Court for the District of Maryland was proper pursuant to 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

This case involves the Equal Pay Act, 29 U.S.C.§ 206(d)(1) (2000) and Title VII, 42 U.S.C § 2000e.

The Equal Pay Act states in pertinent part:

> No employer... shall discriminate ... between employees on the basis of sex by paying wages to employees... at a rate less than the rate at which he pays wages to employees of the opposite sex... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. § 206(d)(l)(2000).

Title VII states in pertinent part:

> It shall be an unlawful employment practice for an employer – (1) to... discriminate against an individual with

> respect to his compensation... because of such individual's...sex...

42 U.S.C. § 2000e–2(a).

STATEMENT OF THE CASE

Petitioners, two female employees, filed a two count complaint against their employer, Wicomico County, (Respondent) alleging violations of the EPA and Title VII. They presented undisputed evidence that they were paid less than male employees in the same grade within the Respondent's classified pay plan. After two-and-a-half days of testimony, Petitioners rested. The Respondent made an oral motion for judgment.

During argument on the motion for judgment Petitioners' counsel explained that the wage disparity between men and women could be seen in Respondent's pay practices by referring to the fact that all of the male directors and deputy directors were paid more than the female directors and deputy directors. Petitioners' counsel also explained that the pay disparity could be seen by referring to the Respondent's classified pay plan. Petitioners were paid less than the men in the same pay grade.[1]

---

[1]A grade is a salary range. Employees in the same grade can be paid different amounts but the difference is generally due to longevity within a grade.

The trial judge expressed "surprise" when hearing Petitioners' second argument -- that the pay disparity was apparent by reference to the pay grades and classified pay plan. The trial judge refused to entertain that argument because it had not been articulated in the complaint or in opening statement.

Petitioners appealed to the Court of Appeals for the Fourth Circuit. That Court affirmed the District Court. The Fourth Circuit failed to address the merits of Petitioner's appeal but affirmed on grounds not briefed. The Court of Appeals held that the lower court could apply the rule of appellate procedure that issues may not be raised for the first time on appeal. It held that the trial judge could refuse to entertain an argument that was not articulated in the complaint or in the Petitioners' opening statement.

Petitioners filed a Petition for Panel Rehearing or Rehearing En Banc pointing out that the appeal was denied for reasons that were not briefed. The Petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

Introduction

This case presents two important issues worthy of Supreme Court review. First, the question of whether a classified pay plan may be used as evidence of discrimination under the Equal Pay Act and Title VII has not been decided by this Court. This Court recently

decided that a Title VII mixed motive case can be proved with either direct or circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S.90 (2003). Here, the evidence against the employer was the employer's own classified pay plan. This classified pay plan was an admission of a party that all jobs in a particular classification were comparable. The decision in *Desert Palace* should be extended to make it clear that parties in discrimination cases may use any type of evidence that could be used in any other civil lawsuit.

Second, the Fourth Circuit has issued a reported decision that articulates an entirely new and dangerous procedural rule. It adopts the appellate rule that issues may not be raised for the first time on appeal and applies that at the trial court level. Doing so violates Federal Rules of Civil Procedure 50 which permits the trial judge to enter judgment after a party has been fully heard "and there is no legally sufficient evidentiary basis for the jury to find for that party on that issue." The Rules do not require that a party articulate her argument in the complaint or opening statement -- only that the evidence be in the record. Applying a rule of appellate practice to motions for judgment at the trial level places an inappropriate burden on litigants and can have untoward and unexpected results.

Issue 1

EVIDENCE THAT A FEMALE EMPLOYEE IS PAID LESS THAN MALE EMPLOYEES IN THE SAME GRADE CAN BE USED AS EVIDENCE OF DISCRIMINATION UNDER THE EQUAL PAY ACT AND TITLE VII.

Classified pay plans are common throughout modern employment, both in the private and public sectors. The concept behind a classified pay plan is to group similar jobs, those that require similar levels of education, training and experience, into the same grade. Human resources experts and consultants study an employer's jobs, assign points for the relevant job related considerations, and group jobs with similar point values into the same grade or class. For example, a secretary in the billing department, all else being equal, should earn the same as a secretary in the receiving department. This provides a studied framework for an equitable pay system.

In this case, the employer, Wicomico County, hired a consultant, Charles Hendricks, to perform precisely this service. He examined the various jobs performed by the Respondent's workforce. He then assigned points to the various jobs and created a classified pay plan that grouped substantially equal positions into the same grades. This became known as the Hendricks Study.

Unfortunately, the Respondent made a critical mistake when it implemented the new classified pay plan. Instead of paying workers according to their grade, experience, productivity and other work relevant considerations, it used the employees' prior salary to set their salary after the study. This had the effect of perpetuating preexisting wage discrimination. As stated by the trial judge in his opinion: "The Hendricks study, I do now understand, didn't cure any historic wrong."

The two petitioners in this case are the Director of Emergency Services for Wicomico County and her Deputy Director. Since they are at the head of their department, there are no other employees in the County doing precisely the same work. However, the Respondent employs directors and deputy directors of numerous other departments, nearly all of whom are male.

Petitioners argued that the essence of the job of all directors is the same. They supervise subordinates, conduct staff meetings, prepare budgets, answer to the same County Council, and otherwise manage their departments. The Respondent has approximately eleven departments, all of which are run by a director, and some of which have a deputy director. None of the other directors or deputy directors have greater seniority or performance ratings than Petitioners. There is no evidence in the record that the job performance of the other directors is or was at any time in any way superior to that of Petitioners. Petitioners contend that they were properly compared to other directors and deputy

directors and presented undisputed evidence that there was a significant disparty in pay between the men and women.

Petitioners also presented undisputed evidence that they were paid less than the male employees in their same grade. In the case of the two Petitioners, the way in which the study was implemented, using prior salaries in the formula, placed them in the same grade as male employees but at a substantially lower salary. Grogan, for example, earned less than males in her same grade and, indeed, even a recently hired male employee that she supervised. Wheatley earned approximately $25,000 less than the male directors and deputy directors and substantially less than the males in her grade.

Petitioners complained and, receiving no resolution from the Respondent, filed suit under the Equal Pay Act and Title VII. They alleged unequal pay for equal work and disparate treatment. They remain employed as the Director and Deputy Director of Emergency Services for the Respondent and continue to be paid less than comparable male employees.

At trial, Petitioners presented evidence that they were being paid less than male employees in the same grade, despite their greater seniority and experience. The lower court insisted that they could not succeed under the Equal Pay Act because their jobs were unique and they could identify no male employees in the same position. The lower court rejected the notion that

Petitioners could rely on the classified pay plan to compare themselves to male employees in the same grade. The trial judge refused to entertain the argument because it was not expressed in Petitioners' opening statement or in the complaint.

Under the EPA, 29 U.S.C. § 206(d), an employer is obligated to provide equal pay for equal work:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs, the performance of which requires equal skill, effort, responsibility, and which are performed under similar working conditions.

29 U.S. § 206(d)(1). To prove a *prima facie* case, an employee need not prove the duties performed are identical to that of a male, but rather that the skill, effort and responsibility required in the performance of the job is substantially equal. *Pearce v. Wichata County*, 590 F.2d 128, 133 (5th Cir. 1979). It is sufficient if there is "substantial identity" in the skill, effort and responsibility required for the tasks performed. *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972). The relevant inquiry on the equal work issue is whether the jobs to be compared have a "common core" of tasks such that a "significant portion" of the two jobs is identical. *Brewster v.*

Barnes, 788 F.2d 985, 991 (4th Cir. 1986). *Brennan v. Prince William Hosp. Corp.,* 503 F.2d 282, 285 (4th Cir. 1974) (asserting that a plaintiff must prove "substantial equality of skill, effort, and responsibility as the jobs are actually performed"), cert. denied, 420 U.S. 972 (1975); *Soble v. University of Maryland,* 778 F.2d 164 , 167 (4th Cir. 1985) (citing Brennan); *Brewster v. Barnes,* 788 F.2d 985, 991(4th Cir. 1986) (citing Brennan); *Pearce v. Wichata County,* 590 F.2d 128, 133 (5th Cir. 1979). In determining if a woman is paid less for a job "substantially equal" to a man's, the Courts must make an "overall comparison of work, not its individual segments," *Buntin v. Breathitt County Bd. of Ed.,* 134 F.3d 796, 799 (6th Cir. 1998); *E.E.O.C. v. Hernando Bank, Inc.,* 724 F.2d 1188, 1196 (5th Cir. 1984). Only the skills actually required by those jobs, and not the abilities of the persons in those positions are relevant. *Glenn v. General Motors Corporation,* 841 F.2d 1567, 1569 (11th Cir. 1988). In determining if a woman is paid less for a job "substantially equal" to a man's, the Courts examine the jobs rather than the job title or description. *E.E.O.C. v. Hernando Bank, Inc.,* 724 F.2d 1188, 1196 (5th Cir. 1984).

If a Plaintiff establishes a *prima facie* case that an employer has paid members of the opposite sex different wages to perform jobs that require "equal skill, effort, and responsibility, and which are performed under similar working conditions," 29 U.S.C. §206(d)(1) (2000), the burden shifts to the defendant to establish one of the Act's four defenses. *Brinkley v. Harbour Recreation Club* , 180 F.3d 580, fn. 13 (4th

Cir. 1999); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 344 (4th Cir. 1994). Those four defenses are:

> i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

See Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974).

In the instant case the trial judge made clear in his opinion that he was granting judgment in Respondent's favor because, in his estimation, Petitioners had not made out their *prima facie* case. He did not reach the issue of whether Defendant had established any of the Act's four defenses. The trial judge granted Respondent's motion for judgment because Petitioners failed to establish that there were any comparable male employees doing precisely the same work. Essentially, the lower court interpreted the EPA as being inapplicable to Petitioners because there were no male directors in the Emergency Services Department. He found all the evidence related to director and deputy director positions in other departments being substantially equal insufficient.

Petitioners also presented evidence that they were paid less than male employees in the same grade. When an employer establishes a classified system that intentionally groups jobs of substantial equality together

in the same grade, that action is an admission by the employer. In this case, the employer's own document, the Hendricks study, was adopted by Respondent for the specific purpose of defining jobs as substantially equal. Nonetheless, Petitioners were earning less than the male employees in their same grades. Therefore, Petitioners presented sufficient evidence of substantial equality from which a reasonable jury could find a *prima facie* case.[2]

An employer can use the four statutory defenses to justify a difference in pay between employees in the same grade. For example, differences in the quality or quantity of work would justify paying individuals differently even though they were in the same grade. Likewise longevity or meritorious performance could provide such a justification. Indeed, any reason other than gender can justify a difference in pay. But in this case, where the performance of the Petitioners was exemplary, and where they had over twenty-five years of dedicated service to the Respondent, there is certainly sufficient evidence from which a reasonable jury could conclude that a violation of the EPA was taking place. At a bare minimum, Petitioners

---

[2]Another admission of the Respondent is the fact that Petitioner Grogan earned less than a male she supervised, William Nutter. By placing them in the same grade and allowing Grogan to supervise him Respondent admitted that Grogan should have been earning at least as much as him. The Fourth Circuit failed to address how this admission could be ignored.

established a *prima facie* case and the burden shifted to the employer to justify its pay differentials.

In *Soble v. University of Maryland*, 778 F.2d 164, 166-67 (4th Cir. 1995), one of the cases relied upon by the Fourth Circuit, the Court held that the plaintiff, an assistant professor in the school of dentistry, had not presented proof that she was comparable to any of the males in the school of dentistry and would not consider her comparisons to assistant professors in other departments. In a vacuum, the mere similarity in titles is not sufficient to prove equal work. However, in the instant case, Petitioners presented evidence of not merely the same job title, but evidence they performed substantially the same duties as the male directors and deputy directors and, most importantly, that they were paid less than the males in the same grade.

The EPA contains no requirement that Petitioners choose a particular male employee for a comparator. The statute simply says that men and women doing the same work must be paid equally. Evidence of a male employee performing the same or similar work is one way of proving a case. However, nothing in the statute excludes other forms of evidence such as an admission of a party. For example, if the Respondent had plainly admitted or stipulated that Petitioners were paid less than men doing equal work, there would have been no need for Petitioners to present evidence relating to a particular male comparator. The Respondent's classified system and the Hendricks Study are nothing less than admissions by the Respondent that

Petitioners are performing work comparable to that of males in the same grade. Two employees can surely be paid at different points along the range of a pay grade. Indeed, the Respondent could have defended the disparity in pay based on a merit system or any of the other defenses listed in the statute. However, by placing two jobs in the same grade, the Respondent has admitted that the work for that grade is comparable, and any differences in pay must be justified by one of the four statutory defenses.

In short, the Petition for Certiorari should be granted because there are no reported cases that make clear that jobs classified within the same grade are considered comparable under the Equal Pay Act. Such a ruling would be both logical and good policy. It would give new teeth to the long neglected and marginalized Equal Pay Act.

Issue 2

PETITIONERS WERE UNDER NO OBLIGATION TO ARGUE THEIR CASE IN THE COMPLAINT OR IN OPENING STATEMENT SO AS TO APPRISE THE TRIAL JUDGE OF THEIR LEGAL ARGUMENTS. THE PROPER TIME TO ARGUE A CASE IS IN RESPONSE TO A MOTION FOR JUDGMENT OR IN SUMMATION.

The Court of Appeals affirmed the lower court in a ten page opinion that does not address the most important argument raised by Petitioners, namely that they were paid less than male employees of the same grade. The Court refused to consider this argument because it was not set forth in the complaint or in Petitioners' opening statement. In fact, this argument had been raised before on several occasions and, more importantly, the evidence to support it was in the record. There simply is no rule or even trial practice that requires the Plaintiffs to lay out in the complaint or in opening statement the arguments they intend to make. The Court's reported opinion creates a new procedural requirement for litigants that is truly groundbreaking. By barring Petitioners' argument the Fourth Circuit is authorizing a sanction that can be

leveled against Petitioners because the trial judge was "surprised" by Petitioners' argument.[3]

The issue of "surprise" was not raised by the Respondent on appeal and was never briefed in the Court of Appeals. Rather, the Fourth Circuit Court raised this issue, *sua sponte*, during oral argument and established this as the law of the Fourth Circuit in a reported decision.

In its opinion the Fourth Circuit borrows the rule from appellate practice that an issue cannot be raised for the first time on appeal. The Court applies this rule to the trial courts and now prohibits a litigant from making a legal argument that was not expressed in the complaint or in opening statement.[4]

---

[3]"The new argument did not appear in the complaint, nor was it mentioned to the jury in opening statements. And the switch caught the trial judge and opposing counsel completely by surprise." Fourth Circuit Slip Op. at 9 (App. A, p. 35-37)..

[4]Contrary to the Court's opinion, it was not Petitioners' counsel that "dump[ed] an argument on a district court at the last minute" or made a "last minute change in strategy." (App. A, p. 35-37).. It was the procedural history of this case that was unusual and may have misled the lower court. Because most discrimination cases involve lengthy motions for summary judgment the trial judge is generally familiar with the facts and legal arguments of the case. In this case, however, Respondent

The Fourth Circuit criticized Petitioners' counsel because, in its view, "[t]he new argument did not appear in the complaint, nor was it mentioned to the jury in opening statements." (App. A, p. 35-37). This is contrary to long standing pleading and trial practice. Under Fed. R. Civ. P. 8(a) a complaint need only contain "a short and plain statement of the claim showing the pleader is entitled to relief." Opening statements may not contain "argument." *United States v. Dinitz,* 424 U.S. 600, 612 (1976) (Burger, C.J., concurring). Under FRCP 50 a motion for judgment may be granted only when there is no evidentiary basis to support a claim. There is no requirement that arguments be articulated in the complaint or in opening statement or, indeed, at any point prior to the argument

---

did not file a motion for summary judgment. Therefore, the case went to trial with little pretrial involvement by the Court. Prior to the start of trial, the Court's only substantive involvement related to several unrelated discovery motions. Consequently, when the Defendant made a motion for judgment at the end of the Petitioners' case it was the first time the Court heard the full explanation of Petitioners' view of the evidence. Until that point it would have been inappropriate for Petitioners' counsel to have argued to the jury, such as during opening statement, and there was no prior opportunity for him to argue to the judge since no motion on the issue had been filed. The first opportunity for Petitioners' counsel to formally articulate his argument, his view and interpretation of the evidence, was when responding to the motion for judgment after Petitioners' case.

on the motion for judgment. In short, both the trial court and the Fourth Circuit erred in refusing to consider Petitioners' argument. The principle upon which that refusal is based could wreak havoc in trial courts throughout the Circuit. Unless changed, litigants will now be required to argue their case-in the complaint and in the opening statement for fear that, during a motion for judgment or during closing argument, they will be barred from making an argument that had not previously been articulated.

The rule that an issue cannot be raised for the first time on appeal[5] cannot be applied to trial courts. Trials are where the issues are raised. The Petition for Certiorari should be granted because litigants throughout the Fourth Circuit are now subject to a far-reaching rule that is not authorized in the Federal Rules of Civil Procedure.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Fourth Circuit Court of Appeals. Classified pay plans are now common, and are intended to bring employers into compliance with discrimination laws. When they are used appropriately they create valid defenses to charges of illegal discrimination. However, when they show clear disparities between men and women in the same

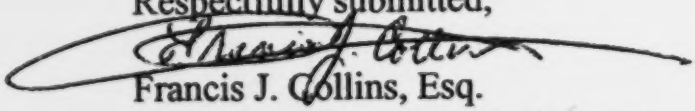
---

[5] *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

grade, they are evidence from which a reasonable jury could find discrimination. At a bare minimum they can be used to create a *prima facie* case that must be rebutted. This is not a case of the lower court making erroneous factual findings. Rather, the lower courts are making the value judgment that a classified pay plan cannot be considered when determining what jobs are comparable under the EPA and Title VII.

The appellate rule that issues may not be raised for the first time on appeal cannot be applied in the trial courts. The Fourth Circuit has now plainly stated that it and trial judges need not consider issues that litigants failed to raise in the complaint or in opening statement. This new policy, never before applied at the trial level, has the potential to drastically alter the litigation process starting from the moment suit is filed to the end of closing arguments. This policy is not in keeping with the Federal Rules of Civil Procedure and cannot be sanctioned.

Respectfully submitted,



Francis J. Collins, Esq.
Counsel of Record for Petitioners
201 North Charles St. 10th Floor
Baltimore, Maryland 21201
(410) 244-1010

APPENDIX

TABLE OF APPENDICES

Appendix A:	Opinion of the Fourth Circuit Court of Appeals.
Appendix B:	Oral Opinion of the District Court.
Appendix C:	Denial of Petition for Rehearing by the Fourth Circuit.

Appendix A

OPINION OF THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SANDRA WHEATLEY; JANE GROGAN,

Plaintiffs-Appellants,
v.

WICOMICO COUNTY, MARYLAND,

Defendant-Appellee.

NO. 03-2406

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(CA-0 1-1 665-JFM- 1)

Argued:September 29, 2004

Decided:November 22, 2004

Before WILKINSON and LUTTIG, Circuit Judges,
and Henry E. HUDSON, United States District

Judge for the Eastern District of Virginia, sittting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Luttig and Judge Hudson joined.

COUNSEL

Francis Joseph Collins, KAHN, SMITH & COLLINS, P.A., Baltimore, Maryland, for Appellants. Shirlie Norris Lake, ECCLESTON & WOLF, Baltimore, Maryland, for Appellee.

OPINION

WILKINSON, Circuit Judge:

Sandy Wheatley and Jane Grogan supervise the Wicomico County, Maryland, Emergency Services Department, which includes the 911 call center. In June 2001, they sued the County, alleging violations of the Equal Pay Act and Title VII. Ms. Grogan and Ms. Wheatley claim that male department supervisors are paid significantly more than female department supervisors, despite the fact that all perform substantially equal managerial work. The plaintiffs also accuse the County of sex discrimination.

We are unpersuaded that "equal work" under the Equal Pay Act can be established when two employees have similar titles but responsibilities that bear no more than the most general resemblance. We likewise affirm the district court's dismissal of plaintiffs' Title VII claims.

I.

Wicomico County employs over 500 people, organized in approximately eleven different departments. The departments vary in size and function. The Emergency Services Department is comprised of approximately 22 people; it operates the 911 call center 24 hours a day, 365 days a year. Since 1986, Sandy Wheatley has served as director of the Emergency Services Department. Jane Grogan has been the deputy director since 1997. Neither woman's job competence has been questioned.

Beginning in 1999, Wicomico County commissioned a study to evaluate its compensation schedule for all 500 of its employees. The purpose of the study was to ensure that County employees were being paid equally for equal work, and also to guarantee that they were being paid comparably to persons in the same positions in other jurisdictions. This "Hendricks Study," performed by Charles Hendricks, led Wicomico County to reconfigure its pay schedule.

The new plan created 22 separate grades and assigned a numerical grade to all County jobs. Grade assignments were based on seven criteria: education, job complexity, scope and impact, supervision, working relationships, working environments, and physical demands. Mr. Hendricks chose these seven criteria because he found them comparable to the four criteria set forth in the Equal Pay Act.[1]

Once the jobs were assigned a grade, individual salaries were set using a mathematical formula, based in part on pre-study salaries. Within each grade, the Hendricks study recommended a minimum, maximum, and mid-point salary. Ms. Wheatley's job was originally classified as Grade 16, though it was re-classified as Grade 17 after she filed a complaint with the County Administrative Director. Although she received an 18% pay increase as a result of the Hendricks study, her salary was set below the mid-point of her grade. Ms. Grogan's job was classified as a Grade 13 —her pay increased by a similar proportion, but she too received a salary below the mid-point of her grade. Ms. Wheatley now earns $65,808 annually, and Ms. Grogan earns $49,164.

---

[1]The EPA mandates equal pay for the performance of jobs which require (1) equal skill, (2) equal effort, (3) equal responsibility, and which are performed under (4) equal working conditions. 29 U.S.C.§206(d)(1) (2000).

The case proceeded to trial on October 20, 2003. Ms. Wheatley and Ms. Grogan offered statistical evidence to demonstrate a pay disparity between male department leaders and female department leaders. Both plaintiffs suggested that they are paid, on average, $25,000 a year less than the male directors and deputy directors in other departments. Additionally, plaintiffs submitted statistics indicating that while they were assigned salaries below the midpoint for their Hendricks grades, all male directors and deputy directors were given salaries above their grade midpoints.

Ms. Wheatley and Ms. Grogan also attempted to demonstrate that department managers all perform the same general duties. Ms. Wheatley testified that, like herself, directors of other departments supervise subordinates, conduct staff meetings, prepare budgets, answer to the same County Council, and otherwise manage their departments. She told the jury that, aside from a difference in subject-matter, all department heads bore the same responsibilities.

After two and a half days of presenting evidence, plaintiffs rested. Before putting on its case, the County made a motion for judgment as a matter of law. The trial judge heard argument on the motion. It was during this argument that plaintiffs' counsel first articulated a new theory of the case. He argued

that plaintiffs perform work substantially equal to the work performed by male employees whose jobs are assigned the same Hendricks Grades. On this new theory of the case, Ms. Wheatley would point not to other department heads but to male employees in Grade 17 as her comparators, and Ms. Grogan would compare herself to males in Grade 13.

At this point in the hearing, the district court expressed frustration with the new strategy. He emphasized that "from the outset," the case had been tried "on the theory that the heads of the departments are comparable positions, both for purposes of Title VII and the Equal Pay Act." The court concluded that plaintiffs had failed to establish sufficient comparability with these department leaders. As for a potential comparison to employees in the same Hendricks grade, he concluded that this theory of the case should have been identified earlier. Since it was not announced until after all of plaintiffs' evidence had already been submitted, the trial judge refused to entertain the new argument.

The district court granted the County's motion for judgment as a matter of law, and plaintiffs now appeal.

II.

The granting of a motion for judgment as a matter of law is reviewed de novo. *Corti v. Storage Tech. Corp.*, 304 F.3d 336, 341 (4th Cir. 2002). Such a motion is properly granted "if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof" *Singer v. Dungan,* 45 F.3d 823, 827 (4th Cir. 1995)(internal quotation omitted).

Ms. Wheatley and Ms. Grogan allege Wicomico County violated the Equal Pay Act ("EPA") which provides:

> No employer . . . shall discriminate . . .between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a

> differential based on any other factor other than sex.

29 U.S.C. § 206(d)(l)(2000). To make out a prima facie case under the EPA, the burden falls on the plaintiff to show that the skill, effort and responsibility required in her job performance are equal to those of a higher-paid male employee. *Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974). In interpreting the EPA, "'[e]qual means *substantially equal."' Hodgson v. Fairmont Supply Co.,* 454 F.2d 490, 493 (4th Cir. 1972)(quoting *Schultz v. Wheaton Glass Co.,* 421 F.2d 259, 265 (3d Cir. (1970)).

The plaintiffs eventually articulated two separate legal theories, both anchored in the EPA. The district court found their first argument to be deficient, and their second argument to be tardy. For the reasons that follow, we agree.

A.

We first address plaintiffs' original theory of the case the one relied upon at trial. As expressed in their opening statement, Ms. Wheatley and Ms. Grogan's strategy was to compare their jobs to jobs held by male department heads. To support their theory, the women relied on evidence that all managers — regardless of department subject matter

ultimately perform the same supervisory duties. They all, for instance, prepare budgets, monitor employees, and conduct meetings.

We decline to accept the argument, however, that employees with the same titles and only the most general similar responsibilities must be considered "equal" under the EPA. In actuality, plaintiffs present a classic example of how one can have the same title and the same general duties as another employee, and still not meet two textual touchstones of the EPA — equal skills and equal responsibility.

First, it is simply not the case that all department director positions require equal skills. Both the Director and Deputy Director of Public Works in Wicomico County, for instance, are required to hold graduate degrees in civil engineering. By contrast, Ms. Wheatley and Ms. Grogan perform their jobs well without possessing any advanced degrees at all. While it is certainly true that plaintiffs provide valuable services to the County, it would be disingenuous to argue that their jobs require skills substantially equal to the jobs which require engineers to direct the Department of Public Works. Indeed, to accept plaintiffs' position would mean that although market demand for different skills may vary greatly, the salaries that employers pay for such skills must be the same.

The case law reveals a helpful analogy. In *Soble v. University of Maryland,* 778 F.2d 164 (4th Cir. 1985), a female Assistant Professor sought to compare herself, for purposes of the EPA, to other assistant professors in a dental school. Professor Soble, who taught in the field of community dentistry, held degrees in sociology and social work. *Id.* at 167. The vast majority of her colleagues, however, held degrees in dentistry. We found that merely possessing the same title of "assistant professor" was not enough to satisfy the EPA requirement of "equal skills." *Id.* Because the professorships in other departments were "highly specialized and requir[ed] distinct skills" we foreclosed Professor Soble from making an EPA comparison to them. *See also Strag v. Bd. of Trustees,* 55 F.3d 943, 950 (4th Cir. 1995)(employing similar analysis for the EPA claim of a female math instructor). Similarly, pointing to the mere appellation of "department head" does not suffice to carry plaintiffs' burden under the skills prong of the EPA.

In addition to their failure to show equal skills, Ms. Wheatley and Ms. Grogan also fall short of satisfying a second major EPA requirement. They fail to establish that their jobs and the jobs of other department heads carry substantially equal

responsibilities. We have explained that jobs do not automatically involve equal effort or responsibility even if they "entail most of the same routine duties." *Hodgson,* 454 F.2d at 493. Jobs are considered unequal — despite having the same general core responsibilities — "if the more highly paid job involves additional tasks which (1) require extra effort .(2) consume a significant amount of the time . . . and (3) are of an economic value commensurate with the pay differential." *Id.* (internal quotation omitted).

Despite plaintiffs' arguments to the contrary, it is significant that different Wicomico County departments perform completely different functions. The Director of Recreation, Parks & Tourism is, among other things, responsible for park maintenance; the Director of Public Works is responsible for coordinating the dredging of waterways; and the Director of Emergency Services is responsible for coordinating resources in the event of a disaster. Granted, at a high level of abstraction these positions all require directors to do the same thing — supervise, coordinate, and organize. But, the EPA demands more than a comparison of job functions from a bird's eye view.

In enacting the EPA, Congress chose the word "equal" over the word "comparable" in order "to show that the jobs involved should be virtually

identical, that is . . . very much alike or closely related to each other." *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973)(internal quotation omitted). *See also Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989); *EEOC v. Madison Community Unit School Dist.*, 818 F.2d 577, 582 (7th Cir. 1987). Here, we have employees whose jobs demand the performance of quite different functions. Ms. Wheatley and Ms. Grogan do not deny that the various County departments differ in subject-matter. In fact, although Ms. Wheatley testified that all directors bear the same type of job responsibilities, she admitted that on a day-today basis, they work in "different world[s]."

It may well be true that all Wicomico County department directors prepare budgets and work schedules. It is certainly not true, however, that all departments have budgets and workforces of equal size. If there is a director or deputy director whose job involves the same responsibilities as does Ms. Wheatley's or Ms. Grogan's, and if any extra tasks performed by this director are indeed inconsequential, plaintiffs certainly failed to identify him.

We do not suggest that Ms. Wheatley and Ms. Grogan's action faltered because it failed to identify one specific individual who constitutes a perfect male comparator. The text of the EPA may not be brushed

with such a demanding gloss. However, in choosing a proper comparator position, plaintiffs cannot indiscriminately aim at all department supervisors collectively, and then expect to meet the EPA standard of "substantial equality tin] skill, effort land] responsibility." *Kovachevich v. Kent State University,* 224 F.3d 806, 826 (6th Cir. 2000). *See also Hodgson,* 454 F.2d at 493 (same). The inquiry must be more specific. The comparison to the male employee has to be made "factor by factor" and cannot be made to "a hypothetical male with a composite average of a group's skill, effort, and responsibility." *Houck v. Virginia Polytechnic Inst.,* 10 F.3d 204, 206 (4th Cir. 1993). It is here that plaintiffs fall short.

Accepting the EPA argument relied on by plaintiffs at trial would be unfaithful to the statutory text. In essence, plaintiffs ask us to convert the EPA equality standard into a similarity test. We decline to hold that having a *similar* title plus *similar* generalized responsibilities is equivalent to having *equal* skills and *equal* responsibilities. Were we to adopt that position, we would deprive compensation stmctures of all flexibility and deny employers the chance to create pay differentiations that reflect differing tasks and talents. In passing the EPA, Congress embraced "the principle of equal pay for equal work regardless of sex." *Corning Glass* 417 U.S. at 190. Congress did not authorize the courts "to engage in wholesale reevaluation of any employer's

pay stmcture in order to enforce their own conceptions of economic worth." *Prince William Hosp. Corp.*, 503 F.2d at 285. There is no question that Ms. Wheatley and Ms. Grogan are valuable assets to Wicomico County. But it is not the job of the courts to discard Congress' studied use of the term "equality" and set the price for their services.

For the above reasons, we agree with the district court that plaintiffs' original EPA argument lacks merit.

B.

Plaintiffs also ask us to consider a second EPA argument, which was unveiled moments before the district judge granted judgment for the defendant. Rather than comparing themselves to other County directors and deputy directors, Ms. Wheatley and Ms. Grogan switched course and asked to be compared to male employees assigned their same Hendricks grade (Grade 17 and 13 respectively). We need not address the merits of this argument, however, for we agree with the lower court that this theory came too late in the day for the case to be fairly tried on it.

Issues raised for the first time on appeal "are generally not considered absent exceptional circumstances." *Williams v. Prof Transp. Inc.*, 294 F.3d 607, 614 (4th Cir. 2002). *See also Singleton v.*

Wuiff 428 U.S. 106, 120 (1976). The policies behind the rule are obvious: "respect for the lower court, [an avoidance of] unfair surprise to the other party, and the need for finality in litigation and conservation of judicial resources." *Tele-Communications, Inc. v. Commissioner,* 12 F.3d 1005, 1007 (10th Cir. 1993)(internal quotation omitted).

Although the plaintiffs technically voiced their second EPA argument to the lower court, those policy concerns are still implicated. Plaintiffs raised their new theory at the eleventh hour — once they sensed that their original theory was doomed. The new argument did not appear in the complaint, nor was it mentioned to the jury in opening statements. And the switch caught the trial judge and opposing counsel completely by surprise. With some frustration, the trial court addressed plaintiffs' counsel:

> I don't want to be impatient with you... [but] you're telling me that you can now go to the jury on a whole different theory than was presented in opening statement, [and] was presented in your client's testimony.
>
> [Plaintiffs] are the ones who should have identified [their theory] early, not leaving it up, just throwing it all up and say, well, we'll decide that later, Judge,

> you decide it as the case gets narrowed down. That's just not the way trials work.

The adversary system cannot function properly if lawyers are allowed to dump arguments on a district court at the last minute, without developing them during the course of litigation. Certainly, litigants are permitted to make alternative arguments as part of their case-in-chief. But there is a thin line between an alternative argument and a last-minute switch in strategy which risks severely prejudicing an opponent and surprising the district court. This situation is an example of the latter.

Despite plaintiffs' contention to the contrary, it is insufficient that the evidentiary basis for their second argument may exist somewhere in the record. An appellate court "cannot assume the functions of a special master and roam at large over the record, . . .any attempt on its part to do so would probably do a great deal more harm than good." *Hutchinson v. Fidelity Inv. Ass'n,* 106 F.2d 431, 436 (4th Cir. 1939). Lawyers have a duty not just to submit evidence, but to provide some focus to their argument. This was not done here.

III.

We thus decline to address the merits of plaintiffs second EPA argument, and we affirm the district court's holding on their first.[2] The judgment of the district court is

AFFIRMED.

---

[2]Plaintiffs additionally contend that the district court erred by awarding judgment to defendant on their Title VII claims. "Although the evidentiary burdens shift back and forth under the *McDonnell Douglas* framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Love-Lane v. Martin,* 355 F.3d 766, 786 (4th Cir. 2004), (quoting *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981)). The trial judge noted that "perhaps one could make a policy decision that the head of Emergency Services should be paid the same as the head of Public Works." But to say that Title VII requires such an outcome is a different matter altogether. The county contended throughout that any pay differentials reflected nothing more than the fact that employees were performing different jobs. The evidence provides no basis for concluding that this explanation serves as a pretext for the practice of intentional sex discrimination.

Appendix B

ORAL OPINION OF DISTRICT COURT JUDGE

THE COURT: This was a case which required, in my judgment, some, a full presentation of the plaintiffs' [Petitioners'] evidence in a manner that I could fully understand the issues and rule upon the issues. And that couldn't have been done on a cold record on summary judgment. But I am persuaded I can do so now, after plaintiffs have had full opportunity to present their case.

Plaintiffs really have failed in what is their first obligation, which is to identify a comparable job. I did not accept the proposition, based upon the evidence, that all department heads are the same. They may be, but as a matter of law, I do not accept that proposition.

Clearly, within a corporate organization, vice presidents of IT may be paid more than vice presidents of sales, or probably less than vice president - - well, both probably pretty highly paid. Engineering, there are all kinds of different, the mere, the title, although certainly evidence, is not sufficient evidence to withstand a Motion For Directed Verdict or for, I guess it's now called for Motion For Judgment As a Matter of Law. And Mr. Collins hasn't stated to the contrary, and I absolutely agree that the title is evidence but it is not sufficient evidence.

So one then must look for more. And the plaintiffs' burden is to prove the more. Certainly, there are

similarities in the job. And the plaintiffs testified very accurately about what they do that other department heads do. But simply to stop there and say, but we're just doing the same thing in different subject matter areas and to totally ignore as part of their proof what the other subject matter areas are is, in my mind, not sufficient for them to meet their burden of proof.

I mean, the Department of Public Works stand as a clear example. I'm not saying - - perhaps, perhaps one could make a policy decision that the head of Emergency Services should be paid the same as the head of Public Works. That would be a policy decision. But to say that the Equal Pay Act requires it, I certainly cannot say, where the job qualifications and the expertise necessary for being the head of Public Works requires being a licensed engineer, for example.

So I do not accept the proposition that simply, that the plaintiffs simply can be compared to, quote, "heads of departments." And the Soble case certainly does support that. Simply the title of assistant professor isn't enough to make the jobs comparable.

Is there a position to whom the plaintiffs could have proved their jobs is comparable? I don't know. I know it wasn't done. Is there a position somewhere? I know we had the testimony of the sheriff, who thought his job was the same. Could there have been focused inquiry upon a specific position to make an Equal Pay Act claim? Perhaps there could have been. But that isn't the way the plaintiff

proceeded and their proof has not proceeded in such a way as to permit the case to be fairly tried on that basis.

So the plaintiffs' basic theory has been, as enunciated in opening statement and throughout, has been, we should be paid the same as, in Ms. Wheatley's case, as other department heads, in Ms. Grogan's case, as other deputy directors, directors of departments and deputy directors of departments. And there is simply a total failure of proof on that issue.

There also has not been sufficient evidence about any other given position. For example, the head of Department of Corrections, comparing job qualifications, job duties in such a way as to enable the case to go to the jury on that basis. And I frankly do believe it's the plaintiff, that was the plaintiff's theory. They are the ones who should have identified that early, not leaving it up, just throwing it all up and say, well, we'll decide that later, Judge, you decide it as the case gets narrowed down. That's just not the way trials work.

The whole trial had a different focus. And the plaintiffs did not meet their burden. The same is obviously true as to the argument made by Mr. Collins just now, that, well, you can use the Hendricks study and compare, for example, Ms. Wheatley to everybody else in grade 17. Well, there are no other directors in grade 17. There has been no, no evidence, for example, about the airport manager. If the plaintiffs' theory is that that was a comparable job, there would have to be some comparability there.

So the plaintiffs have failed to identify a job. And those jobs which have been identified clearly, as part of their burden of proof, the plaintiffs have to show that equal skill is involved. Some of the positions they've identified clearly involve different skills. And their proof fails.

The question then becomes Title Seven. Certainly, the two statutes are to be, the Equal Pay Act and Title Seven are to be construed harmoniously. I'm not saying that there may not be a case in which the standard of proof for a comparator to make a McDonnell Douglas showing under Title Seven may be slightly broader than under the Equal Pay Act. That may or may not be the case. I don't have to decide that here because, again, there is no proof as to any given position that gets close to meeting, even if it's a more relaxed standard under Title Seven. I'm not saying it is a more relaxed standard. Even if there is, there simply is no position identified as to, to compare the plaintiffs' respective positions to.

I've tried to listen. And it would be very difficult to have proceeded to the next stage with turning this case, say, into a case, comparing it to the Deputy Director of Recreation and Parks. But I don't want to be arbitrary. I don't want to be unfair. If the case could have proceeded on that, perhaps it somehow could have been resurrected because the plaintiffs have had a Title Seven claim throughout. But the evidence does show that the Department of Parks does include the Civic Center.

And I remember that testimony. I think Mr. Molnar, either in his deposition or, I think maybe in his deposition testimony. Clearly, that changes the equation. I don't know how it plays out. I'm not saying it makes the job any less or more important. But it obviously becomes, it is not simply running Parks, it's running Tourism, and a major business portion. And that just changes the job qualifications. And I just can't willy nilly say that there's enough to proceed fairly now in a comparison on that basis.

Ms. Wheatley and Ms. Grogan, I really just want to tell you, and it's not going to help you any because I know how you feel. You could be right. Maybe women have been underpaid in Wicomico County. I'm not saying they haven't been. I'm not saying.

And I do now understand, if you're in the wrong grades, it's not going to help and it's going to take time to catch up.

The Hendricks study, I do now understand, didn't cure any historic wrong. I understand that. But he did try to come in, and maybe you didn't like the way he was doing it, but he was trying to do the right thing. And the formula he's come up, at least in the grades, is over some time, is going to improve it.

I've been sitting here doing the math. I realize you get even more than the 5% of the midpoint, if you're under the midpoint that wouldn't be fair to you. So I'm not

saying this is going to, from your point of view is going to be fair.

If you all feel that women have been unpaid in Wicomico, I'm not going there because I don't know.

But my job is to analyze the evidence and see whether or not the Equal Pay Act and the Title Seven claims have been proven. I just can't find that they have been.

So therefore, I am going to grant the motion. But the one thing, and I say it again and I don't just mean as a sop, you all do a good job and ought to be proud of it whatever you're paid. But if you think you're being underpaid, I understand why that hurts you. But that's a policy decision for the county to make. I'm not saying you are unpaid. I'm just saying it's important that people be paid fairly. But I just don't think as a matter of law that the claims have been made out. Let's get the jury.

(Jury enters the courtroom at 12 noon.)

THE COURT: Ladies and gentlemen, obviously, I've taken more time than even the 20 minutes that I said we would. But rightly or wrongly, by spending that time, I am going to cut into the time that you have to serve in this case, because after the plaintiffs have presented their evidence, defendants are entitled to make what is called a Motion For a Judgment As a Matter of Law, saying that the plaintiffs, their evidence, even construed in the light most favorably to them, is insufficient to meet the

elements of the federal claim. And I have granted that motion.

I'm not going to give you all the legal reasons for that. But I'm going to try to summarize a little bit what I've told the lawyers in terms of ruling on the motions.

Number one, and most importantly, is that from this evidence there's no inference other than and, in fact, the evidence shows that Ms. Wheatley and and Ms. Grogan are terrific public servants who are doing a job in a terrifically important area. And my ruling does not in any way suggest to the contrary.

Frankly, my ruling also doesn't, isn't based upon whether or not there has been historic underpayment of women in Wicomico County. I don't know that. It may be one could infer from things here, some trends, it looks like they may be, it looks like they may not be, but what I've got to do is to analyze the evidence in terms of the elements of the federal claim, and there are two, under the Equal Pay Act and under Title Seven.

Briefly stated, in the Equal Pay Act it's the plaintiffs' obligation to identify what is called, make it easy, a comparable position. And the case has gotten this far on the theory, and I've allowed it to go on this theory, that being the director of a department is sufficient to meet that burden. But I wanted to hear all of the evidence concerning that. And frankly, given, to use an example, the Department of Public Works, where somebody has to be a licensed engineer to hold that position, obviously,

something under the Equal Pay Act that the employer can take into account is the education or professional requirements for the job.

Simply to compare this position to the department, the head of Department of Public Works, you simply can't do that as a matter of law. That's not to say that this job isn't just as important. It's not that the county shouldn't make the decision for them to pay the people the same. That's the question for them to decide as the employer. But I have found, rightly or wrongly, as matter of federal law, those are not comparable positions because one of the things is that the job has to involve the same skills and things of that nature, and they don't.

The question, is there another job in there somewhere where they might have been comparable? Maybe there is but that's not been the plaintiffs' theory. The plaintiffs' theory throughout has been directors, directors to be treated the same as all other directors and deputy directors are to be treated as all other deputy directors. And the case simply has not been tried on the basis that I can make a decision as to any particular position because the theory has been the general one and the general theory I have found to be insufficient; that you simply can't compare the positions.

The fact that, yes, there are some job responsibilities that are unquestionably are the same -- budget preparation, supervision, attending meetings. But there are other things that the various directors have to do. And absent adequate proof, which I have found there isn't,

there isn't a position to be compared to. So therefore, the plaintiffs' proof has failed.

Essentially, the same is true about Title Seven. You have to prove a comparable position that, say, a woman was treated less well than a man or, in a given case, a man less well than a woman, but usually in this day and age it's the women less than men, again, on the same analysis that there hasn't been a specific position described by which the plaintiffs have compared themselves.

So finding an insufficiency of proof, I have found that the case can't be submitted to you all because you all, it can't simply be thrown to you all and decide on a general basis, well, do directors really all do the same thing, is Emergency Services just as important as Public Works? That's not what it's all about. What the federal law requires is that, among other things, that, for the plaintiff to prove their proof, make their proof, is that skills have to be the same and they haven't proven that.

So on that basis, and again, to emphasize that this is no reflection upon the plaintiffs in any way or the importance of the work that they do or any suggestion, and I want to make it clear that any suggestion that what their department does is anything less important than any other department. That's not what I'm saying. It obviously is an incredibly important department that requires a great responsibility, which the plaintiffs are providing. That's not the question I'm asked to decide.

The question I'm asked to decide is a far more technical one, is whether or not the elements of proof under federal law have been met, and I have found that they have not been. So that's the end of the case.

Thank you all very much. There are a couple other things. I've got, this is a small thing, certificates that I was going to sign but I haven't signed them yet because frankly, I didn't expect to do this, but having heard the arguments, I've decided it's the right thing to do, to thank you for your service.

What I'm now going to tell you I don't just mean as a vain thing. We really rely upon our jurors around here. If there s anything we can do to make your service better, please let me know. If there's anything, anything from the original selection process to the way we do things when you all come in, we' re sorry. I think it was explained to you that unfortunately the jury room is being renovated. I know things were a little out of whack. But if there's anything we can do to make your service better, please let us know.

I usually tell this to jurors after they come in, having deliberated, but I'm going to tell you the same thing. The longer I sit on the bench, the happier I am there's a jury system. I don't care how many years you go to law school, there's nothing to substitute for the common sense and the fairness of the American people. And. I often am very concerned that if the jury system ever failed, and I've seen no indication of it in this court, then the country's going to be in big trouble because it's a

wonderful thing that you all come in and deliberate on matters of importance and make your decision. Frankly, that's one of the things that makes me a little uncomfortable about my decision on this.

I've been trying to be self critical and see if I'm somehow using my judgment to intrude on your province because you're the ones who really, on basic issues, I have a lot more confidence in your collective judgment than I do in my own. But I do have a gatekeeper role and I do have to decide whether or not I think the proof, this is all technical, has been sufficient to have the case go to you all.

So I've just decided, frankly, just because, I just cannot find from the evidence that all directors are the same for federal law purposes and, therefore, you can make your decision on that basis. And frankly, there's nothing else in the proof that I can hang my hat on to pick out one position and say, well, this should be used as the comparator. The case simply hasn't been tried on that basis. And I simply can't do that.

So I wish we had your judgment on the important things. But as I say, to do my job responsibly, I've done what I've done.

Thank you very much for your service and have a very nice day. Counsel, thank you very much for the way you've tried the case.

(Conclusion of Proceedings.)

Appendix C

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE
FOR THE FOURTH CIRCUIT

FILED
December 21, 2004

No. 03-2406
CA-01-1664-JFM-1

SANDRA WHEATLEY; JANE GROGAN

Plaintiffs - Appellants

v.

WICOMICO COUNTY, MARYLAND

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no

member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Luttig and Judge Hudson.

For the Court,

/s/ Patricia S. Conner

CLERK

(2)

No. 04-1169

IN THE

Supreme Court of the United States

SANDRA WHEATLEY and JANE GROGAN,

Petitioners,

v.

WICOMICO COUNTY, MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS J. ALTHAUSER
Counsel of Record
SHIRLIE NORRIS LAKE
ECCLESTON AND WOLF, P.C.
729 East Pratt Street, 7th Floor
Scarlett Place
Baltimore, Maryland 21202
(410) 752-7474

Attorneys for Respondent

193679

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, under the Equal Pay Act and Title VII, jobs classified in a "classified pay plan," without additional evidence, can be used to show a disparity in pay.

2. Whether the Court of Appeals for the Fourth Circuit erred in holding that a trial court may decline to consider a theory raised for the first time in response to a motion for judgment, when said theory had not been raised in the pleadings or in opening statement to the jury.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING the PETITION	6
1. Petitioners Fail To Advance Any Recognized Justification For Review Under Rule 10 ...	6
2. This Court Need Not Decide Whether A Classified Pay Plan May Be Used As Evidence Of Discrimination Under The Equal Pay Act And Title VII	9
3. The Fourth Circuit Decision Was A Correct Affirmation Of The Trial Court's Case Management Authority, Serving To Prohibit "Surprise" Or "Trial By Ambush" Tactics ..	12
CONCLUSION	19

TABLE OF CITED AUTHORITIES

Page

Cases:

ADC Telecommunications, Inc. v. Thomas & Betts Corp., 2001 U.S. Dist. LEXIS 17796 (D.Minn 2001) 12, 14, 17

Brewster v. Barnes, 788, F.2d 985 (4th Cir. 1986) .. 10

ESPN, Inc., v. Office of the Comm'r of Baseball, 76 F. Supp. 2d 416 (S.D.N.Y. 1999) 15

Flannery v. Carroll, 676 F.2d 126 (5th Cir. 1982) .. 15

Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972) 10

Lamonds v. General Motors, Corp., 34 F.Supp. 2d 391 (W.D.Va. 1999) 16

Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979) 10

Point Productions v. SONY Music Entertainment, Inc., 2002 U. S. Dist. LEXIS 24450 (S.D.N.Y. 2002) 15

Rosario-Diaz v. Gonzalez, 140 F. 3d 312 (1st Cir. 1998) 14

Shelak v. White Motor Co., 581 F.2d 1155 (5th Cir. 1978) 14

Cited Authorities

Page

United States v. First Nat'l Bank, 652 F.2d 882 (9th Cir. 1981) 17

Valdes v. Leisure Resource Group, Inc., 810 F.2d 1345 (5th Cir. 1987) 14

Wheatley v. Wicomico County, 390 F.3d 328 (4th Cir. 2004) 2, 5

Woods ex rel. v. International Harvester Co., 697 F.2d 635 (5th Cir. 1983) 14

Statutes:

29 U.S.C. § 206 ..... *passim*

42 U.S.C. § 2000e ..... *passim*

29 C.F.R. § 1620.13 11

Rule:

United States Supreme Court Rule 10 ..... 6, 7, 8

INTRODUCTION

The trial court ruled, and the Court of Appeals has affirmed, that the Petitioners' case, and the evidence relied upon, are insufficient to sustain a cause of action under the Equal Pay Act, 29 U.S.C. § 206, or Title VII, 42 U.S.C. § 2000e. The United States Court of Appeals for the Fourth Circuit also ruled that the United States District Court for the District of Maryland is authorized to effectuate its case management function in the interest of justice by prohibiting "trial by ambush" tactics. The Fourth Circuit noted the trial court has the authority to prevent parties from raising a last minute "surprise" theory of recovery after resting its case so as to prevent prejudice to adverse parties. These are proper decisions within the authority of these courts, and they do not pose a question sufficient for review by this Court.

The trial court in the present matter evaluated the case, and it properly determined that Petitioners' evidence did not meet the standards required under the Equal Pay Act and Title VII to sustain a claim. Petitioners simply disagree with the court's application of the law to the facts specific to this case. There is no conflict between the circuits, nor is there any important Federal question on this issue previously undetermined for this Court to address.

The trial court determined that the Petitioners failed to demonstrate substantial equality or similar situation between their positions and the positions compared to support their claims under the Equal Pay Act and Title VII respectively. The trial court found that Petitioners had failed to sustain a *prima facie* case under the theory that Petitioners' jobs were substantially equal or similarly situated to those of other

department directors and deputy directors. Petition for Writ of Certiorari, Appendix B, at 38-39. There simply was an insufficient showing of substantial equality or comparability under the EPA or Title VII.

The "classified pay plan" in the present matter was also deemed insufficient to sustain Plaintiffs' cause of action because Petitioners failed to introduce any evidence comparing the jobs/positions in the same "grade" as Petitioners, and, therefore, they could not establish the necessary equality or similarity between them. Petition for Writ of Certiorari, Appendix B, at 40-41. A decision must be made on a case-by-case basis, after an evaluation of the scale, the positions compared, and the tasks and responsibilities of each. Petitioners simply disagree with the application of the well-settled law by the trial court.

The Court of Appeals for the Fourth Circuit upheld the trial court's decision with regard to Petitioners' failure to sustain a *prima facie* case on the theory of equality and comparability between the Petitioners and male department directors and deputy directors. *Wheatley v. Wicomico County*, 390 F.3d 328, 334 (4th Cir. 2004). The Fourth Circuit declined to rule on the trial court's determination that the classified pay plan scale was also insufficient in supporting Petitioners' claims. The Fourth Circuit did not need to reach that issue because it determined that Petitioners did not timely raise the issue, and as such, the trial court was not required to substantively address it, although it had. *Id.* The Fourth Circuit approved the trial court's case management authority to avoid "trial by ambush" tactics that are clearly disfavored. Despite Petitioners' attempt to cast the actions of the trial court and Fourth Circuit as improvidently expanding an appellate rule to the trial court level with detrimental effect,

the Fourth Circuit's decision merely affirmed the long standing principle of a trial court's authority to prevent last minute "surprise" tactics at trial by one party that would prejudice the adverse party's case.

Petitioners fail to identify any specific criteria or rationale that the issues raised are worthy of consideration by this Court. Petitioners fail to specifically allege, much less demonstrate, any distinct split among the circuits, pressing issue of unresolved federal law, or action taken contrary to prior decisions of this Court. The matters presented to the Court are not of the nature or type properly suited for review by this Court. Consequently, a Writ of Certiorari should not be granted.

STATEMENT OF THE CASE

On June 8, 2001, Appellants, through their attorney, Francis J. Collins, Esquire, filed a two count Complaint, alleging violations of Title VII and the Equal Pay Act.[1] The Complaint alleged that Plaintiffs are two of the few female directors and deputy directors of departments in Wicomico County, Maryland government, and that the County displays a pattern and practice of paying all such high-level female employees less than similarly situated male employees. In addition, Plaintiffs alleged that, for at least the past three years, they have been paid substantially less than the male directors and deputy directors of departments in Wicomico County government, and that Defendant has made this distinction because Plaintiffs are female.

---

1. Appellants filed Charges with the EEOC in September of 2000, and on March 12, 2001, the EEOC sent each a Dismissal and Notice of Rights.

Trial began in the United States District Court for the District of Maryland before a jury with the Honorable J. Frederick Motz, presiding, on October 20, 2003. At the conclusion of Plaintiffs' case, on October 22, 2003, Defendant made a Motion for Judgment as a Matter of Law on the basis that Plaintiffs had failed to prove a *prima facie* case of a violation of either the EPA or Title VII. Judge Motz granted that Motion on the basis that Plaintiffs had failed to identify a specific male comparator as required under the EPA, rejecting Plaintiffs' argument that all Wicomico County department heads are the same. Petition for Writ of Certiorari, Appendix B, at 38-40. He noted that Plaintiffs had failed to present any evidence regarding a specific male director or deputy director whose job was comparable to theirs. Accordingly, Judge Motz found that there was "simply a total failure of proof" on Plaintiffs' EPA claim. *Id.* Furthermore, he held that Plaintiffs had failed to put on any evidence regarding the skill, effort, responsibility and working conditions of any other director and/or deputy director position. Judge Motz also held that Petitioners failed to present any evidence to support the last minute argument that their jobs were substantially equal to the jobs of male County employees in the same pay grade. *Id.* Finally, Judge Motz held that Plaintiffs had failed to prove a *prima facie* case of discrimination under Title VII.

Petitioners appealed the trial court's decision to the Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the trial court's decision that Petitioners failed to make out a *prima facie* case on the basis of equality of the jobs of department heads throughout Wicomico County, i.e. performing *substantially equal* duties, as contemplated by the EPA or being similarly situated as contemplated by Title VII. The Fourth Circuit noted that the trial court found

Petitioners' argument to be deficient, and the Fourth Circuit agreed. The Court of Appeals for the Fourth Circuit specifically declined to accept the notion that employees with the same titles and general similar responsibilities must be considered "equal" under the Equal Pay Act. The Fourth Circuit stated that the Petitioners had failed to establish that their jobs and the jobs of other male department heads involved substantially equal responsibilities.

The Fourth Circuit declined to address the merits of Petitioners' last minute argument – that they could rely upon the classified pay plan scale adopted by Wicomico County to demonstrate "substantially equal" work between Petitioners and male County employees of the same grade. Although the trial court specifically found the Petitioners' case deficient under this theory as well, the Fourth Circuit affirmed the trial court's decision on the grounds that Petitioners failed to raise such an argument or theory in a timely manner. The Fourth Circuit noted that the theory came "too late in the day for the case to be fairly tried on it." *Wheatley v. Wicomico County*, 390 F.3d 328, 334 (4th Cir. 2004). Petitioners filed a Petition for Panel Rehearing *en banc*. The Petition for Rehearing, however, was denied.

Petitioners have now filed a Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE PETITION

1. Petitioners Fail To Advance Any Recognized Justification For Review Under Rule 10

Rule 10 of the Rules of the Supreme Court of the United States sets forth the criteria governing review and the granting certiorari. The Rule illustrates numerous guideposts for determining justification for review by this Court. The factors set forth in Rule 10 include the following:

> 1. There exists a conflict between a decision of one United States Court of Appeals and that of another on the same important matter;
>
> 2. A decision of one United States Court of Appeals on an important federal question conflicts with a decision by a State Court of last resort;
>
> 3. A United States Court of Appeals has issued a decision that drastically departs from the accepted and usual course of judicial proceedings, or sanctions such departure by a lower court;
>
> 4. A United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

See Sup. Ct. R. 10. Rule 10 also states that a Petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioners fail to demonstrate that the issues raised implicate any of the criteria set forth in Rule 10. First, Plaintiffs do not claim that there is a split among the circuits with regard to any of the issues raised in this matter. Additionally, Plaintiffs do not identify an important question of federal law, as the term is used in Rule 10. Finally, Petitioners fail to identify any departure from the usual course and proceedings, so as to require the supervisory powers of this Court to intervene.

Petitioners' claims are nothing more than that the courts below misapplied proper law. Petitioners assert that the trial court should have found that the classified pay plan was sufficient evidence of "substantially equal" work under the EPA and similarity of situation under Title VII.[2] Petitioners attempted to pursue their causes of action based upon the theory that the disparity between the male and female employees of Wicomico County could be demonstrated by the differences between the salaries of male County employees and those of Petitioners in the same grade under the classified pay plan; however, this theory was not raised until oral argument on Respondent's Motion for Judgment.[3]

2. In support of their contention, Petitioners make the conclusory allegation that the classified pay plan is an admission on the part of Respondent that the positions are substantially equal. (Petition for Certiorari at 12). Petitioners, however, provide no support or authority for the contention that such a document constitutes an admission.

3. Respondent moved for judgment on the basis that Petitioners failed to establish a *prima facie* case based on the theory espoused to that point, namely that all department directors and deputy directors of departments served as comparators under the statutes in that the work was substantially equal. Respondent asserted there was insufficient similarity, and judgment was, accordingly, proper.

Petitioners seek to assail the trial court's finding that the classified pay grade plan was insufficient to establish substantial equality of work under the EPA or similarity of situation under Title VII. The trial court indicated the plan was insufficient because Petitioners had not compared their jobs to those of any individual's job in the same pay grade, and they now attempt to attack this threshold evidentiary ruling by the trial court. The Court did not decide an issue of law contrary to this Court or any other in making its determination. It merely applied the valid law in effect. Indeed, what Petitioners seek to attack is the application of the law. However, under Rule 10, that is not a proper basis for the grant of a Writ of Certiorari.

The same is true of Petitioners' claim that the Fourth Circuit improperly adopted for the trial court the appellate rule that issues may not be initially raised on appeal. In raising this point, Petitioners fail to identify any authority, whatsoever, which supports their position that such a ruling is improper or inconsistent with the accepted practices and procedures maintained throughout the courts. Petitioners identify no decision from this Court or any Court of Appeals determining that such action is improper. Therefore, it cannot be said that such action on the part of the trial court, and the affirmation thereof by the Fourth Circuit, is a departure from the accepted procedures so as to require the intervention of this Court in its supervisory role.

The Fourth Circuit merely reaffirmed the trial court's well-accepted function of case manager. Although the trial court considered Petitioners' 11th hour theory, and rejected it on its merits, the Fourth Circuit did not reach this issue because it determined that it had been raised too late. The trial court was not required to permit the Petitioners to

pursue a previously unraised theory of the case only after having realized that the Court did not accept that t[illegible]evidence presented supported Petitioners' original theory. T[illegible] Fourth Circuit determined that the trial court was merely serving to preclude Petitioners from engaging in conduct consistent with surprise, or "ambush" tactics. There is no novel issue of law in this regard. Petitioners attempt to characterize the Fourth Circuit's affirmation of routine case management function as something more expansive and far reaching in an attempt to salvage their claims.

2. This Court Need Not Decide Whether A Classified Pay Plan May Be Used As Evidence Of Discrimination Under The Equal Pay Act And Title VII

Petitioners assert that this Court should determine whether a "classified pay plan" may be used to establish discrimination under the EPA and Title VII, and that this Court has not decided such issue previously. Petitioners sum up their position in their Petition by asserting: "In short, the Petition for Writ of Certiorari should be granted because there are no reported cases that make clear that jobs classified within the same grade are considered comparable under the Equal Pay Act." Petition for Writ of Certiorari, at 14.

Petitioners' own characterization demonstrates its fatal flow. Petitioners seek a ruling from this Court that jobs classified within the same pay grade should be considered substantially equal under the Equal Pay Act. However, Petitioners cite no justification for this proposition. Petitioners do not claim that such matter is an important question of federal law. They do not claim that there is existing authority that holds a contrary ruling. The Petitioners do not even assert that either the trial court or the Fourth

Circuit held that jobs classified within the same grade might never be considered substantially comparable under the Equal Pay Act.

The trial court did not make a determination that such classified pay grade plans may never be used. Rather, the Court relied on the extensive body of case law setting forth, and defining the standards to be applied to EPA cases. The trial court, in making its determination, made a finding that it was necessary for the Petitioners to establish that the positions in the same pay grade being compared were "substantially equally." To demonstrate a *prima facie* case under the EPA, it is necessary that an employee demonstrate that the skill, effort, and responsibility required in the performance of the employee's job is substantially equal to that of a male. *Pearce v. Wichita County*, 590, F.2d 128 (5th Cir. 1979). As the Petitioners have noted, it is sufficient if there is "substantial identity" in the skill, effort, and responsibility required for the tasks performed. *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972). Titles and position names are not of much assistance in this regard. Rather, the inquiry and analysis will focus on the duties themselves. The question is whether the jobs being compared demonstrate the necessary "common core" of tasks that make a "significant portion" of the two jobs identical. *Brewster v. Barnes*, 788, F.2d 985, 991 (4th Cir. 1986). It is this very analysis and framework that makes the present case unsuited for review by this Court.

Making determinations of adequate comparators under the EPA is necessarily done on a case-by-case analysis. *Brewster*, at 991. Therefore, although Petitioners assert that a grant of Certiorari is necessary, so that a ruling can be made that jobs in the same pay grade under "classified pay plans"

are comparators under the EPA, the existing case law is contrary to such a blanket proposition. The law on this matter is already well settled: each case must be assessed and evaluated in its own right. The specific job or position being held out as comparable needs to be independently evaluated. There must be a determination of the two positions, side by side, to determine whether the necessary "common core" of tasks exists. Therefore, there can be no blanket ruling indicating that jobs in the same pay grade in "classified pay plans" are comparators under the EPA. Such a *per se* rule would contradict existing case law.

The executive regulations promulgated pursuant to the statutory enactments at issue demonstrate this. 29 C.F.R. § 1620.13 of the Federal Regulations promulgated in connection with the Equal Pay Act states in pertinent part:

> Job content controlling. Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance. For example, the fact that jobs performed by male and female employees may have the same total point value under any evaluation system in use by the employer does not in itself mean that the jobs concerned are equal according to the terms of the statute.

29 C.F.R. § 1620.13(e).

As the regulation makes clear, the institution of a pay plan does not, of itself, constitute comparability under the Equal Pay Act. This is consistent with the well-settled case law establishing that the jobs, themselves, must be compared

based on the core of tasks, and the identity thereof, rather than simply based upon job titles, point classifications or some other artificial means of comparing positions. Therefore, there is no need for this Court to review this issue on certiorari.

At best, Petitioners' claim is that the trial court misapplied existing law regarding the applicability of classified pay plans as evidence in discrimination matters. However, such a contention is not a proper basis for granting the Writ under the guidelines established in Rule 10.

3. The Fourth Circuit Decision Was A Correct Affirmation Of The Trial Court's Case Management Authority, Serving To Prohibit "Surprise" Or "Trial By Ambush" Tactics

Petitioners attempt to characterize the decision of the Fourth Court as an expansive, far-reaching attempt to apply an appellate procedural rule to trial court level proceedings, claiming that this is inconsistent with the procedures normally accepted by the courts. Petition for Writ of Certiorari at 15 – 16. However, the Fourth Circuit properly ruled that the trial court was carrying out its accepted role of supervising the case management of its docket. *ADC Telecommunications, Inc. v. Thomas & Betts Corp.*, 2001 U.S. Dist. LEXIS 17796 (D. Minn. 2001). The court is charged with doing so in the interest of justice. Petitioners assert that the Fourth Circuit erred by applying to the trial court level the appellate rule that an issue may not be raised for the first time on appeal when the court refused to permit Petitioners to pursue a theory of recovery that had not been previously disclosed to the court or the Respondent in the course of pleadings, or to the jury in Petitioners' opening statement. *Id.* Petitioners assert that

the Fourth Circuit Opinion "creates a new procedural requirement for litigants that is truly ground breaking," which should be reviewed by this Court. *Id.* In fact, although during oral argument the trial court indicated that the new theory had been raised too late in the trial, the trial court nonetheless did consider the alternate theory, and found it substantively insufficient.[4] However, the Fourth Circuit relied on the trial court's authority to not even consider the "new" theory in affirming the decision.

The trial court noted that Petitioners had failed to properly and timely raise the theory that recovery was permitted under the EPA on the basis of the "classified pay plan." Rather, Petitioners had pursued their case under the single theory that the Petitioners' positions were comparable to those of male department heads and deputy department heads. Upon the completion of Petitioner's case-in-chief, Respondent filed a Motion for Judgment and argued that Petitioners had failed to meet their burden under the theory that their positions were substantially equal to that of the male directors and deputy directors in the County. When the trial court agreed with Respondent on this issue, counsel for

---

4. Judge Motz held as follows:

> And the plaintiffs did not meet their burden. The same is obviously true to the argument made by Mr. Collins just now, that, well, you can use the Hendricks Study and compare, for example, Ms. Wheatley to everybody else in grade 17. There has been no, no evidence, for example, about the airport manager. If the plaintiffs' theory is that that was a comparable job, there would have to be some comparability there.

(Petition for Writ of Certiorari, Appendix B, at 40)

the Petitioners advanced a new theory – that Petitioners' positions were equal, for the purposes of the statutes, to other positions in the same grade in the "classified pay plan." After noting that the Petitioners had not given notice of such theory of recovery in either the pleadings or in their opening statement to the jury, the trial court substantively addressed the second theory, and found it insufficient to support Petitioners' claims as well. Consequently, such a theory had not been properly disclosed to the court or the Respondent and, additionally, the theory was substantively insufficient.

Despite Petitioners' characterization to the contrary, the Fourth Circuit merely affirmed a trial court's routine authority. Trial courts are left with the discretion to identify and handle case management functions. *Rosario-Diaz v. Gonzalez*, 140 F.3d 312, 315 (1st Cir. 1998). It is a proper exercise of a trial court's discretion to prevent trial by ambush and to ensure that all parties have an ample opportunity to properly prepare their case for trial. Responsible case management by a court requires no less. *ADC Telecommunications, Inc. v. Thomas & Betts, Corp.*, 2001 U.S. Dist. LEXIS 17796 (D. Minn. 2001). Reversible error results from unfair surprise where the Court permits the Plaintiff to add a completely new basis for damages on the eve of trial. *Valdes v. Leisure Resource Group, Inc.*, 810 F.2d 1345, 1357 (5th Cir. 1987) (citing *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978)). The *Valdes* Court explained that the new theory espoused by the Plaintiff served to prejudice the Defendant. Specifically, the Court determined that a Defendant was severely prejudiced when the Judge allowed the jury to consider evidence on a theory of damages never properly incorporated into the Plaintiff's case, and that the Federal Rules of Civil Procedure are intended to avoid this result. *Valdes*, at 1357 (citing *Woods ex rel. v. International Harvester Co.*, 697 F.2d 635, 639 (5th Cir. 1983)). To permit a Plaintiff to switch his theory of the

case after the trial ended would mean that the Defendant would face the possibility of being held liable under a claim that Defendant had no opportunity to evaluate and defend against. *Flannery v. Carroll*, 676 F.2d 126, 131 (5th Cir. 1982). (court denied Motion for Judgment and prohibited plaintiff from pursuing state securities law cause of action with longer limitation period after jury had specifically assessed evidence under original federal securities claim with shorter limitations, finding culpable activity on the part of defendant, but that limitations had run). Thus, courts routinely undertake to monitor case management, precluding the raising of new issues and theories at the 11th hour, so as to avoid prejudice to the opposing party, and to avoid, generally, "trial by ambush."

The case law is legion on this issue in numerous contexts. In the case of *ESPN, Inc., v. Office of the Comm'r of Baseball*, 76 F. Supp. 2d 416 (S.D.N.Y. 1999) the court addressed a similar issue in the framework of a Motion in Limine. Specifically, at the end of oral argument on the Motion, the Commissioner of Baseball offered a new theory of damages in connection with its claim of breach of contract on the part of ESPN for pre-empting several television broadcasts in violation of the broadcasting contract. The court determined that the Commissioner's failure to mention this alternate theory of damages until six days before the trial barred it from presenting such a theory at trial. *Id.* at 420; *See also Point Productions v. SONY Music Entertainment, Inc.*, 2002 U.S. Dist. LEXIS 24450 (S.D.N.Y. 2002) where Plaintiff was precluded from asserting a new damage theory when it failed to do so in the course of the pleadings and discovery, and only raised the theory shortly before a scheduled trial date.

In addition, such management functions often occur in the context of expert testimony, and those cases, too, are analogous to the present case. For example, in *Lamonds v. General Motors, Corp.*, 34 F. Supp. 2d 391 (W.D. Va. 1999), the court addressed the propriety of the Plaintiff introducing a new factual basis for a theory of causation through the use of supplemental expert testimony. The court discussed the competing interests of the Federal Rules of Civil Procedure and the doctrines of judicial estoppel and judicial admission. Specifically, the court noted that the Federal Rules of Civil Procedure, in part, serve to ensure that civil trials seek out the truth, and that this important goal is met by avoiding trial by ambush. Although the introduction of the new theory was deemed to fall short of trial by ambush, the court was of the opinion that the new theory did not serve the goals of the Federal Rules of Civil Procedure, and, accordingly, did not permit the new theory to proceed, given that over two years had passed since the filing of the suit. The court also noted that the doctrines of judicial estoppel and judicial admission attempt to protect the integrity of the court's judicial process. At times, the policies advanced by the Federal Rules and those of the estoppel doctrines will clash, and the trial court is vested with the discretion and authority to resolve these matters and must do so after carefully considering the totality of the circumstances. *Id.* at 396.

Courts routinely require that the parties present all issues and theories so that such issues are known to all parties. This is precisely the function served by pre-trial conferences and pre-trial orders. Courts have prohibited parties from raising issues or theories not raised in the course of the pre-trial conference and set forth in the pre-trial order. If scheduling orders are to serve any meaningful purpose, it is a proper exercise of the trial court's discretion to prevent trial by

ambush and ensure that all parties have an ample opportunity to prepare their cases for the scheduled trial date. *ADC Telecommunications, Inc., v. Thomas & Betts Corp.*, 2001 U.S. Dist. LEXIS 17796 (D. Minn. 2001). Unless pre-trial orders are honored and enforced, the objective of the pre-trial conference to simplify issues and avoid unnecessary proof by obtaining admission of fact will be jeopardized, if not entirely nullified. The parties need offer no proof at trial as to matters agreed to in the order, nor may a party offer evidence or advance theories at the trial which are not included in the order or which contradict its terms. Disregard of these principles would bring back the days of trial by ambush and discourage timely preparation by the parties for trial. *United States v. First Nat'l Bank*, 652 F.2d 882, at 886 (9th Cir. 1981). In the present case, the trial court indicated that the newly raised theory was not previously articulated in the Pre-Trial Order. This is evident by the court expressing "surprise" to the theory when it was raised. Therefore, this was not a theory or issue contemplated by the pre-trial order in the mind of the trial judge.

The Fourth Circuit did nothing more than affirm a trial court's authority to effectuate and carry out its case management function as described in the myriad of cases above. A party may not attempt to raise an issue or theory in an attempt to surprise or ambush an opponent or the court. Petitioner's attempt to raise an alternate theory of recovery after the *Petitioners had rested their case*, would serve to do just that. Petitioners had not tried their case on the basis of this alternate theory, nor had Respondent prepared a defense to this theory. As is the case with late changes in expert testimony or supplementation, a trial court is not required to permit attempts to stray from the issues upon which the case proceeded in discovery and was tried by the addition of new theories of liability or damages at the 11th hour.

Petitioners' arguments that the Fourth Circuit's ruling will wreak havoc throughout the circuits misstates the impact of such a decision. The Fourth Circuit ruling merely served to reinforce the accepted notion that parties may not raise new claims, issues or theories at the 11th hour, to the surprise and detriment of opposing parties and the court. This ruling is totally consistent with previous rulings of this Court, and other appellate courts.

Despite Petitioner's assertion that the actions of the trial court deviated substantially from the procedures normally carried out in other courts, Petitioners cite no authority for such position. On the other hand, the prohibition of "trial by ambush" tactics is well accepted, and the means that the court chooses in doing so is within its discretion. The Fourth Circuit's affirmation in the present case does not constitute an important federal question upon which this Court needs to rule, nor does this action constitute any contradiction with a decision of this Court or any other Court of Appeals ruling. Consequently, no rationale supporting the grant of the Writ on this basis has been established by the Petitioners and, therefore, the Writ should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS J. ALTHAUSER
Counsel of Record
SHIRLIE NORRIS LAKE
ECCLESTON AND WOLF, P.C.
729 East Pratt Street, 7th Floor
Scarlett Place
Baltimore, Maryland 21202
(410) 752-7474

Attorneys for Respondent